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Re: 2006 California Public Contract Code Additions and Revisions, and Recent Public Contract and Related Court Decisions

Dear Clients and Colleagues:

Please take note of the following 2006 revisions to the California Public Contract Code as a result of legislation enacted in 2005, as well as recent court decisions related to public contracts. In this courtesy letter, we have selected those technical provisions which are significant to common public contracting issues.

I. PUBLIC CONTRACT CODE REVISIONS

A. PCC §5103 – Grounds for relief (mistaken bidder)

The time period of this statute has been changed to allow a mistaken bidder to seek relief from a bid when the bidder provided the public entity with written notice. The requirement was formerly five days. It is now five working days, excluding Saturdays, Sundays, and State holidays, after the opening of the bids.

B. PCC §6108 – Sweat-free procurement policy and code of conduct; exemption for certain credit card purchases

This sweat shop-free purchase statute has been amended to exempt credit card purchases of \$2,500 or less, with a total amount of exemption not to exceed \$7,500 per year for each company from which a state agency is purchasing goods by credit card.

C. PCC §6611 – Negotiation process to procure goods, services, information technology and telecommunications; procedures and guidelines

This code section which addresses negotiated contracts to provide goods, services and information technology to the Department of General Services now provides that an unsuccessful bidder shall have no right to protest the results of the negotiating process undertaken pursuant to this section. As a remedy, an unsuccessful bidder may file a petition for a writ of mandate in accordance with §1085 of the Code of Civil Procedure.

D. PCC §10286.1 – State agencies entering into contracts with an expatriate corporation or its subsidiaries; exemption for certain credit card purchases

This statute, which addresses transactions with foreign incorporated entities, now exempts credit card purchase of \$2,500 or less, and \$7,500 per year for each company from which a State agency is purchasing goods by credit card.

E. PCC §10295.1 – Contracts for purchase of tangible personal property; California seller's permit or certificate of registration requirement; exemption for certain credit card purchases

Similarly, this statute which addresses contracts for the purchase of tangible personal property from a vendor or contractor requiring a seller's permit, is not applicable to credit card purchases of \$2,500 or less and \$7,500 per year for each company for which a State agency purchases goods by credit card.

F. PCC §10708 – Agreement for design and construction; approval; bidding (California State University projects)

This statute has been substantially modified to require that when the design of portions of the project permits the selection of subcontractors, the prime contractor shall competitively bid those portions. All subcontractors whose work is in excess of ½ of 1% of the total project cost, must be identified. The subcontractor shall then have rights provided under the Subletting and Subcontracting Fair Practices Act (PCC §4100, *et seq.*).

G. PCC §12200 – Definitions (recycled materials, goods, and supplies)

This section has been materially revised to define the scope and categories of reportable recycled product purchase requirements by all California State agencies. It is the intent of the Legislature that the State pursue all feasible measures to improve markets for recycled products including, but not limited to, bid evaluation preferences for purchases made by the State. If fitness and quality are equal, each State agency is required to purchase recycled products instead of non-recycled products whenever recycled products are available at the same or lesser total cost than non-recycled products.

H. PCC §20133 – Alternative procedures on bidding on building construction projects in excess of two million five hundred thousand dollars in specified counties; four-step process for design-build projects; reporting

This year 2000 statute authorizing alternate procedures on public works projects to allow for design-build (meaning a procurement process in which both the design and the construction of a project are obtained from a single entity), has been substantially modified. The dollar threshold has been reduced to those exceeding \$2.5 million, and it now applies to the following counties: Alameda, Butte, Contra Costa, Del Norte, El Dorado, Fresno, Humboldt, King, Los Angeles, Madera, Mariposa, Mendocino, Merced, Monterey, Napa, Orange, Placer, Sacramento, San Diego,

San Joaquin, San Luis Obispo, Santa Clara, Shasta, Siskiyou, Solano, Sonoma, Stanislaus, Tulare, Yolo, and Yuba.

The statute applies only to buildings and improvements directly relating to the construction of the building, but does not include the construction of other infrastructures, such as streets and highways, public rail transit, or water resources facilities and infrastructure.

I. PCC §20341 – Construction contracts; bids; award; emergencies (Transit Development Boards)

With respect to transit development boards, this code section has been amended to increase the threshold amount from \$20,000 to \$50,000 with respect to competitive bidding requirements.

II. PUBLIC CONTRACT CODE ADDITIONS

A. PCC §6615 – Compliance with Section 12205 (Recycled Products)

All State contracts, and to the extent feasible, all federally funded contracts, are required to comply with §12205 of the Public Contract Code, which requires all contracts to certify in writing the minimum percentage, if not the exact percentage, of post-consumer and secondary material in the materials, goods, or services provided or used.

B. PCC §10111 — Report on contracting activities; contents (State Agencies)

With regard to contracting by State agencies, commencing January 1, 2007, the Department is required to make an extensive and detailed report on contracting activities with respect to consulting services contracts that the State entered into during the previous fiscal year.

C. PCC §12103.5 – Requests for proposals for information technology purchases; required identification and documentation; §12104 – Obtaining bids for acquisition of information technology; policies; procedures and methods; management memorandum of uniform standards for information technology procurement; §12104.5 – Rules and requirements governing requests for proposals for information technology acquisition; written communication to vendors; public posting; addendums

These statutes, which became effective on October 5, 2005, specifically address various rules and requirements governing an information technology acquisition for which it was determined that a Request for Proposal (RFP) was appropriate. These statutes apparently were enacted to protect the integrity of California's information technology procurement practices, and to ensure that the State is not wasting resources on improperly designed technology investments that may fail to perform in critical State health and safety programs.

D. PCC §12201 – Legislative findings and declaration; legislative intent (recycled products)

This new statute and the ones following it (§§12203, 12205, 12207, 12209, 12211, 12215, and 12217) address the intent of the Legislature that the State pursue all feasible measures to improve markets for recycled products, including, but not limited to, bid evaluation preferences for purchases made by the State. If the fitness and quality are equal, each State agency shall purchase recycled products instead of non-recycled products whenever recycled products are available at the same or lesser total cost than non-recycled products.

E. PCC §12203 – Minimum percentage of recycled products purchased; applicable purchases; contracts

Under this new statute, each State agency shall ensure that at least 50% of all reportable purchases are recycled products, and each State agency shall require the businesses with whom it contracts to use, to the maximum extent economically feasible in the performance of the contract work, recycled products.

F. PCC §12205 – Certification of minimum percentage of postconsumer material for sale to the State

This new code section requires that all State agencies shall require all businesses to certify in writing the minimum percentage, if not the exact percentage, of postconsumer material in the products, materials, goods, or supplies offered or sold to the State.

G. PCC §12207 – Application of article; product categories

The various categories of purchase goods and materials subject to these recycled products are set forth in this code section.

H. PCC §12209 – Minimum content requirements

The minimum content requirements of various products are set forth in this code section.

I. PCC §12211 – Annual reports by agencies, departments, and Board

Under this new code section with respect to recycled products, each State agency shall report annually to the Board their progress in meeting the recycled product purchasing requirements.

J. PCC §12215 – Statement on recycled products

This new code section authorizes each State agency, at its discretion, to print a statement on recycled products selected by the agency director, referencing the percentage of postconsumer material contained.

K. PCC §12217 – Review of policies when requirements not met; purchasing specifications; considerations; alternatives

This new code section provides that if at any time a requirement has not been met, the department, in consultation with the Board, shall review purchasing policies and shall make recommendations for immediate revisions to ensure that the recycled products purchasing requirements are met.

L. PCC §20118.2 – Technological supplies and equipment; alternative procurement methods (School Districts)

This new code section provides that due to the highly specialized and unique nature of technology, telecommunications, related equipment, software, and services, because products and materials of that nature are undergoing rapid technological changes, and in order to allow for the introduction of new technological changes into the operations of the school district, it is in the public's best interest to allow a school district to consider, in addition to price, factors such as vendor financing, performance reliability, standardization, life-cycle costs, delivery timetables, support logistics, the broadest possible range of competing products and materials available, fitness of purchase, manufacturer's warranties, and similar factors in the award of contracts for technology, telecommunications, related equipment, software, and services.

This section applies only to a school district's procurement of computers, software, telecommunications equipment, microwave equipment, and other related electronic equipment and apparatus. This section does not apply to contracts for construction or for the procurement of any product that is available in substantial quantities to the general public.

M. PCC §20175.2 – Cities in Solano and Yolo Counties; alternative procedure for bidding on building construction projects; design-build contracts; reporting requirements

This new code section follows PCC §20133 concerning authorization for alternate bidding procedures such as design-build for \$2.5 million and greater projects in various California counties. It is directed in this code section to cities in Solano and Yolo counties.

N. PCC §20682 – Purchase of materials and supplies for the construction or completion of buildings, structures, or improvements; purchase in open market; bidding for contracts; emergencies; alternate procedures (Community Services Districts)

This new statute provides that a district may purchase materials and supplies for the construction or completion of any building, structure, or improvements in the open market when the cost does not exceed \$25,000. Contracts above \$25,000 will require compliance with competitive bidding requirements.

Note that the former PCC §20682 (performance; works of construction or operation) which allowed a district to perform any work of construction or operation under its own superintendence, has been repealed and replaced by this new code section.

O. PCC § 20682.5 – Construction or completion of buildings, structures, or improvements; by district or by contract with or without bidding; emergencies; bonding, cost records; alternate procedures (Community Services District)

This new statute provides that a district may construct or complete any building, structure or improvement with its own forces or by contract without competitive bidding when the cost does not exceed \$25,000. Contracts above \$25,000 will require compliance with competitive building requirements.

P. PCC §20683 – Bidder’s Security (Community Services Districts)

This statute, which has been amended and renumbered, provides that all bids for construction work shall be presented under sealed cover, and shall be accompanied by one of the following forms of bidder security: (a) cash; (b) a cashier’s check made payable to the district, (c) a certified check made payable to the district; or (d) a bidder’s bond executed by an admitted surety insurer, made payable to the district. (This code section was formerly PCC §20685.5.)

Q. (Recycled Product Procurement Mandates Pertaining to Local Governments): PCC §22150 – Preference for recycled products; PCC §22151 – Multiple award bids; recycled product preference cost; PCC §22152 – Certification of minimum postconsumer material percentage; PCC §22153 – Printing contracts; PCC §22154 – Certification by contracting business

The procurement of recycled products have been added to these statutes pertaining to local governments. If fitness and quality are equal, each local public entity shall purchase recycled products instead of non-recycled products, wherever recycled products are available at the same or a lesser total cost than non-recycled items. All local public entities shall require all business to certify in writing the minimum, if not exact, percentage of postconsumer materials in the products, materials, goods or supplies offered or sold. Printer or duplication cartridges require compliance with these code sections. All printing contracts made by any local public agencies also require compliance with this code section and meet the recycled content requirements of §12209. Finally, certification by contracting businesses are required.

III. REPEALED PUBLIC CONTRACT CODE SECTIONS

A. PCC §10308.5 – Certificate by contractor of recycled content

This statute, which required contractors to certify in writing to the State agency awarding a contract, the minimum, if not exact, percentage of recycled content in goods or products used in the performance of the contract, has been repealed.

B. PCC §10354 – Certification by contractor of recycled content

Similar to §10308.5, this statute also previously requiring the percentage of recycled content to be stated, has been repealed.

C. PCC §§10855 – Definitions; 10860 – Purchase preference for recycled paper products (California State University)

With respect to CSU, these statutes requiring purchase preference for recycled paper products have been repealed.

**D. (State assistance for recycling markets):
PCC §12160, *et seq.* (Recycled paper products); PCC §12170, *et seq.* (Recycled fluid, paint, and solvent); PCC §12180, *et seq.* (Compost and co-compost products)**

These codes, enacted in 1989, related to legislative findings and declaration with regard to the State Assistance for Recycling (STAR), have been repealed in their entirety.

PCC sections addressing recycled materials, goods, and supplies has been extensively changed, as noted in Section I of this letter.

E. PCC §12213 – Specification by bidder of recycled content; agencies subject to section

This statute requiring that all local public agencies require the bidder to specify the minimum, if not exact, percentage of recycled product in products offered has been repealed.

F. PCC §12225 – Report on use of recycled products; content

This code section has been repealed.

G. PCC §12226 – Intent; markets for recycled products

This code section has been repealed.

H. PCC §20682 – Performance; works of construction or operation

This same numbered 1983 code section allowing a district to perform any work of construction or operation under its own superintendence, has been repealed and replaced by PCC §20682, with a \$25,000 threshold requirement for competitive bidding requirements above that amount.

I. PCC §20685 – Necessity of bids

This 1983 code section has been repealed. This code section, with a \$15,000 threshold for competitive bidding requirements, has been replaced by PCC §20682, with a \$25,000 threshold requirement for competitive bidding.

IV. OTHER RELEVANT AMENDED OR ADDED STATUTES

A. Education Code §17316 – Contracts with structural engineers or architects

This Education Code section dealing with school facilities is amended to provide that, if a school district reuses plans prepared by a certified architect or structural engineer, the district shall indemnify the architect or engineer and their consultants and employees against potential claims arising out of the re-use of the plans.

B. Government Code §4216.3 – Marking subsurface installation; Government Code §4216.4 – Excavating near subsurface installation

An excavator must determine the location of subsurface utilities before using power-operated equipment near their locations. These Government Code sections have been amended to require that field markings locating subsurface utilities shall conform to the color codes of the American Public Works Association. If the excavator obtains a written agreement with the utility operator, the excavator may utilize vacuum excavation devices or power drill driven equipment near the subsurface utility locations.

C. Labor Code §1776 – Payroll records; retention; inspection; non-compliance penalty; rules and regulations

This statute has been amended to allow for computer printouts of payroll records, verified by a declaration under penalty of perjury, in place of the certified payroll forms provided by the Division of Labor Standards Enforcement (DLSE).

D. Public Resources Code §16002 (Recycled Concrete)

This code section has been added to the Public Resources Code to authorize the use of recycled concrete, provided that the user has been fully informed that the concrete may contain recycled concrete materials.

E. Public Resources Code §42703 (Recycled Paving Materials)

The Department of Transportation is now required to annually use increasing amounts of crumb rubber (reclaimed from discarded tires) in asphalt paving materials beginning in January 2007. The intent of this requirement is to increase the life span and duration of asphalt materials, and reduce soundwall construction costs resulting from noise reduction qualities of rubberized asphalt concrete.

V. RECENT COURT DECISIONS RELATED TO PUBLIC CONTRACTS

A. *N. V. Heathorn, Inc. v. County of San Mateo*, (2005) 126 Cal.App.4th 1526

This decision held that the County could be liable to an unpaid subcontractor for failure to require a prime contractor to post a payment bond. Under Civil Code § 3251, it is illegal for a public agency to pay a contractor unless the contractor has filed a payment bond. This is a mandatory duty under Civil Code § 3247. The County was subsequently held liable for the work performed by the subcontractor when the prime contractor went bankrupt.

B. *County of Solano v. Lionsgate Corporation, (2005) 126 Cal.App.4th 741*

This decision held that claims under the False Claims Act (Government Code § 12650, *et seq.*) are subject to arbitration, and that an arbitrator has jurisdiction to award damages for such. This decision is particularly significant for public entities who may now raise False Claims Act violations, when contractor payment disputes are arbitrated.

C. *Reclamation District No. 684 v. State Department of Industrial Relations, (2005) 125 Cal.App.4th 1000*

This decision held that the placement of fill on a levy was a public work project subject to prevailing wage payment requirements. Labor Code § 1720 defines public works as “construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or part out of public funds.” The work performed under the subject contract was determined by the court to be a public works project, and the exception for irrigation or drainage systems does not apply.

D. *MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co., Inc., (2005) 36 Cal.4th 412*

This decision, with far reaching consequences for contractors, held that a contractor unlicensed when work was commenced cannot recover compensation for work performed even after proper licensure was obtained.

E. *Electrical Electronic Control, Inc. v. Los Angeles Unified School District, (2005) 126 Cal.App.4th 601*

This decision held that a payment bond provided by a replacement contractor did not cover claims against the initial contractor. The awarding body violated Civil Code §3247 by failing to require the replacement contractor to provide required bonds.

F. *McAndrew v. Hazegh, (2005) 128 Cal.App.4th 1563*

The Court of Appeal held that the prompt payment requirements of Civil Code §3260 apply only to the payment of retention funds withheld from progress payments, and not all sums which remain unpaid.

G. *Greystone Homes, Inc. v. Cake*, (2005) 37 Cal.Rptr.3d 183

This decision held that prevailing wage requirements do not apply to certain redevelopment projects. It determined that the Pleasant Hill Redevelopment Agency, by making contributions to a townhome project that contained an incentive to sell 12 homes at below market rates, was not deemed to be a prevailing wage project. The agency had made three contributions to the project, including the conveyance of a parcel of real estate, payment of a traffic mitigation fee, and reimbursement of property acquisition costs paid out of future tax revenues. The court determined that these contributions were not payments for the actual construction of the project, which would have required payment of prevailing wages under Labor Code §1771, *et seq.*

Hopefully this information is of value to you. If you have any questions, or need further information, please do not hesitate to call.

Sincerely,

PHILLIP A. JARET

A handwritten signature in black ink, appearing to read "Phillip Jaret", written in a cursive style.